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No. 03-241

IN THE

Supreme Court of the United States

QWEST CORPORATION,

Petitioner,

v.

METRONET SERVICES CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF

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Pursuant to Supreme Court Rule 15.8, petitioner Qwest Corporation respectfully submits this supplemental brief in light of the Court's recent decision in *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, No. 02-682 (Jan. 13, 2004). As Qwest requested in the petition for certiorari, the Court has held this case for several months pending disposition of *Trinko*. For the same reasons that the case was properly held, the Court should now grant the petition, vacate the decision below, and remand to the Ninth Circuit for further consideration in light of that decision.

In *Trinko*, the Court held that, as Qwest has argued in this case, courts should very rarely impose antitrust remedies for a putative monopolist's refusal to deal with its rivals—both "because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive

conduct by a single firm," *Trinko*, slip op. 8, and because "[m]istaken inferences and the resulting false condemnations are especially costly" in that "they chill the very conduct the antitrust laws are designed to protect," *id.* at 14 (internal quotation marks and citation omitted). The Court further confirmed that such antitrust remedies are *particularly* disfavored where a pervasive scheme of federal or state regulation, such as the Telecommunications Act of 1996, covers the same subject matter. Specifically, "[t]he 1996 Act's extensive provision for access [to an incumbent's network and services] makes it unnecessary to impose a judicial doctrine of forced access." *Id.* at 11; *see also id.* at 12. That principle is just as applicable here as in *Trinko*. *See* Pet. 13-15.

Finally, the *Trinko* decision confirms that *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), "is at or near the outer boundary of §2 liability" and that liability in *Aspen* turned on the defendant's telling "willingness to forsake short-term profits to achieve an anticompetitive end" by refusing to sell to its rival even at its full retail price. *Trinko*, slip op. 9. As Qwest has argued (*see* Pet. 11-12, 16), that feature of *Aspen Skiing* illustrates precisely why any finding of Sherman Act liability would be inappropriate here. Qwest sold to MetroNet on exactly the same terms that it offered to its retail customers. And it adopted a policy of per-location pricing for all customers to *increase* its short term (and long term) profits—specifically, by confining its Centrex discounts to the large business customers that alone would otherwise take their business to independent PBX manufacturers.[1] Although the Ninth Circuit viewed the resulting price increase for some customers as evidence of anticompetitive effect (*see* Pet. App. 30a), the *Trinko* deci-

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[1] As Qwest has explained, such differential pricing arrangements enhance allocative efficiency and must remain lawful if companies in Qwest's position are to retain proper incentives to adopt any welfare-maximizing discounts in the first place. *See* Pet. 18-19.

sion confirms precisely the opposite: "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth." *Trinko*, slip op. 7. Indeed, penalizing such price increases with treble damages under the Sherman Act may well thwart "the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in . . . economically beneficial facilities." *Id.* at 8.

Because *Aspen Skiing* represents "the outer boundary of §2 liability" (*id.* at 9), because this case lacks the critical feature on which liability in that case rested, and because the 1996 Act in any event "makes it unnecessary to impose a judicial doctrine of forced access" (*id.* at 11), there can be no Section 2 liability here. For all of these reasons, a faithful application of *Trinko* would cause the Ninth Circuit to reverse its prior disposition of this case.

CONCLUSION

The petition for certiorari should be granted, the decision of the court of appeals vacated, and the case remanded for further proceedings consistent with this Court's decision in *Trinko*.

Respectfully submitted,

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